IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE A.K.BASHEER

WEDNESDAY, THE 5TH DECEMBER 2007 / 14TH AGRAHAYANA 1929

WP(C).No. 26074 of 2006(D)

PETITIONERS:
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1. **MANAGER,**
   ASSUMPTION COLLEGE, CHANGANASSERY-686 101.

2. **PRINCIPAL,**
   ASSUMPTION COLLEGE, CHANGANASSERY-686 101.

BY ADV. SRI.BABY ISSAC ILLICKAL

RESPONDENTS:
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1. **STATE OF KERALA, REPRESENTED BY ITS**
   CHIEF SECRETARY TO GOVERNMENT,
   GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

2. **MAHATMA GANDHI UNIVERSITY REPRESENTED**
   BY ITS REGISTRAR, KOTTAYAM-686 560.

3. **REGISTRAR,**
   MAHATMA GANDHI UNIVERSITY, KOTTAYAM-686 560.

BY ADV. SRI. T.A. SHAJI, SC, M.G.UNIVERSITY
BY SPL.GOT.PLEADER & LIAISON OFFICER SRI.K.K.RAVINDRANATH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 16/08/2007, ALONG WITH WPC NO. 26920 OF 2006 AND CONNECTED CASES THE COURT ON 05/12/2007 DELIVERED THE FOLLOWING:

W.P.(C) NO.26074/2006

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE PRO FROMA OF THE DIRECT PAYMENT AGREEMENT.

EXT.P2:- COPY OF THE APPOINTMENT ORDER OF THE 2ND PETITIONER DT. 1.4.05.

EXT.P3:- COPY OF THE ORDER NO.AC.BV-(4)/278/04 DT. 7.1.05 OF THE 2ND RESPONDENT.

EXT.P:- COPY OF THE LETTER DT. 10.6.05 OF THE 3RD RESPONDENT.

EXT.P5:- COPY OF THE LETTER DT. 18.6.05 BY THE IST PETITIONER.

EXT.P6:- COPY OF THE LETTER DT. 27.7.06 OF THE 3RD RESPONDENT.

EXT.P7:- COPY OF THE LETTER DT. 21.8.06 OF THE 3RD RESPONDENT.

EXT.P8:- COPY OF THE JUDGMENT DT. 14.1.04 IN WPC. NO.26866/03.

/TRUE COPY/

P.S. TO JUDGE

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A.K. Basheer, J.

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W.P(C) Nos. 26074, 26920, 29036, 29038 & 29039/2006
&12665, 13659, 16936, 16940, 17214, 17273, 17359, 17551, 17717, 17718, 19009, 19490, 19495, 20329, 20986, 23395, 20302 & 20865/ 2007

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Dated this the 5th day of December, 2007 .

JUDGMENT

Some important questions pertaining to the right of the management of private aided colleges, which claim minority status, have cropped up in this bunch of writ petitions.

2. The primary question that falls for consideration is whether the management of a minority institution is bound to appoint the Head of the Institution only on the basis of "seniority cum fitness" as provided under Section 59(3) of the Mahatma Gandhi University Act 1985.

3. The other incidental or ancillary question that has been raised is :

Can the Government insist that the management shall give charge of Drawing and Disbursing Officer in the absence of Principal only to the seniormost teacher?

4. These writ petitions are at the instance of the managements of private aided colleges and their appointees-Principals. It is contended by them that the Government cannot put any fetters on the management of a minority institution to select and appoint a candidate of its choice, as the Head of the institution. It is further contended that the right conferred on a

religious minority institution under Article 30(1) of the Constitution of India does not brook any kind of interference in the administration of its affairs, either from the Government or the University.

5. The post of Principal in the colleges involved in these writ petitions had fallen vacant some time back. It is on record that the managements of these institutions had selected and appointed teachers of their choice to head their respective institutions. The specific case of the petitioners is that the selected candidates are qualified senior teachers (not of course the seniormost). They possess requisite qualifications prescribed in the relevant University Act and Statutes and they are therefore fit and suitable to hold the post of Principal of the respective institutions.

6. The colleges had forwarded the orders of appointment to the University within whose jurisdiction and administrative control these colleges come. However the University has not approved the appointments in most of the cases, except in a few. In those cases in which the University has responded, the managements were directed to produce certificate stating that seniority of no teacher in the college had been overlooked while making the appointment. In one instance, the management was informed that approval cannot be granted since selection was not made in conformity with the statutory mandates. In yet another instance, appointment was approved for a short duration allowing the selected teacher to function as the Drawing and Disbursing Officer only, and it was

specifically ordered that he shall not be entitled to exercise any other statutory powers of the Principal, except to draw and disburse money to the staff and students.

7. In short, the Government took the view that the appointments cannot be approved unless the managements produced documents to show that selection had been made on the basis of seniority-cum-fitness as provided under Section 59(3) of the Mahatma Gandhi University Act. Consequently the Government informed the University that unless and until such documents were produced, the selected candidates shall not be allowed to function as Drawing and Disbursing Officer of the college and that only the seniormost teacher should be appointed as such till a Principal was selected in accordance with the statutory provisions and also till his appointment was approved by the University.

8. It appears that on October 16, 2006 the Government issued Ext.P6 letter (WP.29036/2006) bearing No.23943/D2/06/H.Edn. "instructing" the Deputy Directors of Collegiate Education that "the approval of salary bills from the month of October 2006 presented by the Drawing and Disbursing Officers of aided colleges shall be drawn only on production of a certificate from the University concerned, to the effect that the seniormost teacher has been given charge in the absence of a Principal ." The said letter/order has been impugned in all these writ petitions.

9. The inevitable result of the above stand taken by the Government was that the selected "Principals" could not function

either as Principals or as Drawing and Disbursing Officers, since they were not the "seniomost teachers" in the colleges and also since their appointments were not approved for that reason.

10. In this context it is necessary to refer to the relevant statutory provisions dealing with appointment of Principal/Drawing and Disbursing Officer contained in the Mahatma Gandhi University Act 1985 (for short, the Act) and the Mahatma Gandhi University Statutes ,1997 (for short the Statutes). Relevant clauses of Section 59 of the Act are extracted hereunder:

> "59. Appointment of teachers in private Colleges:--
>
> (1) Appointments to the posts eligible to receive salary from the Government shall be made only against posts sanctioned by the Government or by such officers as may be authorized by the Government.
>
> (1A) Appointments to the lowest grade of teacher in each department of a private college shall be made by the educational agency by direct recruitment on the basis of merit.
>
> (2) Appointments of principals shall be made by the educational agency by promotion from among the teachers of the college or of all the colleges, as the case may be, or by direct recruitment.
>
> (3) Where the appointment of principal is made by promotion, the educational agency shall make

> the appointment on the basis of seniority-cum-fitness.
>
> (4) Appointments to the posts, other than those referred to in sub-sections (1A) and (2) shall be made by the educational agency by promotion from among the teachers of the college or of all the colleges, as the case may be, on the basis of seniority-cum-fitness, or if none among them is fit for promotion, by direct recruitment.
> (5)----------
> (6)----------
> (7)----------
> (8) Every appointment under this section shall be reported to the University for approval.
> (9)----------"

Sri.Ravindranath learned Senior Government Pleader and Liason Officer places heavy emphasis on sub-section (3) of Section 59 extracted above, and contends that the educational agency had no option but to make appointment to the post of Principal on the basis of seniority cum fitness only. The management cannot overlook other senior and eligible teachers in the institution and pick and choose a junior teacher of its choice. He points out that the managements in all these cases had superseded scores of senior

Lecturers in their respective institutions without any rhyme or reason and in gross violation of the statutory stipulation contained in clause (3) of Section 59 referred to above. The University cannot approve such appointments and the Government cannot allow those ineligible teachers to function either as Principals or Drawing and Disbursing Officers. Therefore the Government is justified in insisting that only the seniormost teacher can act as the Drawing and Disbursing Officer in the temporary absence of Principal in the institution who ought to be appointed on the basis of seniority cum fitness. Only the seniormost teacher can be appointed as Drawing and Disbursing Officer, in the absence of Principal. But he cannot exercise any other powers of Principal, though he can function as the Drawing and Disbursing Officer. Thus Ext.P6 letter is in conformity with the provisions contained in statute 78 in Part E Chapter 45 of Mahatma Gandhi University Statutes, 1997. It is further contended by Sri.Ravindranath that petitioners have not produced any document to show that their institutions have been declared as "minority institutions" till date. Therefore so long as the institutions have not acquired minority status, petitioners cannot contend that they are entitled to get the benefit of Article 30(1) of the Constitution.

11. As mentioned earlier, the managements in all these cases have identified and selected qualified senior teachers to head their respective institutions. Obviously these teachers are not the seniormost. The managements insist that the University is bound to approve the selection and appointment made by the managements

so long as the selectees possess requisite qualifications and if they are fit to hold the post. The University can not insist that the managements can make the appointment only on the basis of seniority-cum-fitness, especially since these institutions are "minority institutions".

12. A perusal of clause (3) of Section 59 will unambiguously show that the management of a private aided college has to make appointment of Principal on the basis of "seniority cum fitness". The above clause does not admit of any obscurity on that score. That any private aided college, which is governed by the University Act, Statutes, Ordinance etc. has to function in obedience to the statutory mandates, is beyond controversy. It has also to be remembered that the Government is obliged to pay salary to the teaching and non-teaching staff of the private aided colleges in the State. This being the position, the management of an aided college cannot be heard to say that the Government and/or the University shall not have any power or control in the matter of appointment of teaching staff in the institution.

13. But the position may be entirely different in the case of minority institutions. It is now well settled that in the matter of selection of Head of those institutions, neither the University nor the Government can insist that the will of the management cannot prevail. The above position has been abundantly and unequivocally made clear by a catena of decisions (Malankara Syrian Catholic College v. Jose, (2007 (1) KLT 22 (SC), State of Kerala v. Very

Rev.Mother Provincial, (1970) 2 SCC 417, The Ahmedabad St.Xavier's College Society v. State, (1974) 1 SCC 717, Frank Antony Public School Employees' Association v. Union of India, (1986) 4 SCC 707, In Re, Kerala Education Bill, 1957 (AIR 1958 SC 956, etc.).

14. Statute 78 in Part E of Chapter 45 of the Statutes reads thus:

> "78. Drawing Officer: The Principal of the College, whose appointment has been duly approved by the competent authority, shall be the drawing officer in respect of all the members of staff, both teaching and non-teaching of the college:
>
> Provided that in the temporary absence of Principal or if the approval of appointment of the Principal by the University is delayed, any senior teacher of the college can be appointed as Drawing and Disbursing officer provisionally with the approval of the University. A person so appointed shall not exercise any other powers of the Principal except drawing and disbursing of money to the staff and students." (emphasis supplied).

15. The above Statute lays down that a duly approved Principal shall be the Drawing Officer in respect of all the members of staff, both teaching and non-teaching of the college. The proviso in Statute 78 stipulates that any senior teacher of the college can be appointed as Drawing and Disbursing Officer in the temporary absence of Principal or if the approval of appointment of the Principal by the University is delayed. In such circumstances the senior teacher can function as Drawing and Disbursing Officer provisionally with the approval of the University. However the person so appointed on a provisional basis shall not exercise any other powers of the Principal except drawing and disbursing of money to the staff and students.

16. In the cases on hand "temporary absence of Principal" has arisen in all these colleges, since approval of appointment of the candidates chosen by the managements as Principal has been delayed by the University for the reason that the selectees are not the seniormost. The managements contend, going by the provisions contained in Statute 78 , that any "senior teacher" can function as the Drawing and Disbursing Officer in the temporary absence of Principal. Therefore the insistence of the Government and the Directorate of Collegiate Education that only the seniormost teacher can function as the Drawing and Disbursing Officer cannot be sustained at all.

17. There is considerable force in the above contention. But the

respondents insist that these "senior teachers", even assuming that they can function as Drawing and Disbursing Officers, cannot exercise any other powers of the Principal under any circumstances. It is also contended that the proviso to Statute 78 envisages only a provisional arrangement in the temporary absence of Principal. The situation that has arisen in the colleges involved in these writ petitions is totally different. The managements have, while refusing to comply with the statutory mandate in Section 59(3), chosen junior teachers as Principals overlooking several seniors. Therefore Statute 78 has no application at all. Unless and until the managements make appointments on the basis of "seniority cum fitness", such appointments are not liable to be approved by the University at all and the Government will not be bound to allow any teacher other than the duly approved Principal to discharge the duties and functions of Drawing and Disbursing Officer. I am unable to agree.

18. A Division Bench of this Court Rt.Re.Dr.Jerome M. Fernandez v. University of Kerala and Anr. in O.P.No.982/1977 had occasion to consider the vires of Statute 21 in Chapter 23 of the Kerala University First Statutes 1977 which is in pari materia to Statute 21 of Chapter XXIII of the Mahatma Gandhi University Statutes 1997, which reads thus:

> "21. ***Responsibilities of the Principal***: In every college, the Principal shall be the head of the college and shall be responsible for the internal management and administration of the college.

> In the absence of the Principal, the seniormost professor or in his absence, the next seniormost professor or lecturer of the college, as the case may be shall be in charge of the duties of the Principal. No persons shall be appointed as Principal if he does not possess the qualification and experience prescribed by he regulations."

The Division Bench had considered sub-sections (2), (3) and (9) of Section 57 of the Kerala University Act, which are yet again in pari materia to sub-sections (2), (3) and (8) of Section 59 of the Mahatma Gandhi University Act, while considering the validity of the above Statute in the Kerala Statute. It was held that the prescription in Statute 21 of the Kerala First Statutes that the management of an aided private college shall be obliged to appoint the seniormost Professor or in his absence the seniormost Lecturer of the college as Principal in the absence of the incumbent was violative of Article 30(1) of the Constitution. It was further held that the said prescription in statute 21 was violative of Article 30(1) of the Constitution to the extent it infringes the right of a minority institution to choose a candidate of its choice as Principal, in the absence of the incumbent. A copy of the above judgment is available on record as Ext.P9 in W.P.(C).No.19009/2007. Learned counsel for the petitioners have placed heavy reliance on this judgment in which the Division Bench had referred to the earlier decisions of their Lordships of the Supreme Court as well as of this

Court upholding the right of minority institutions to have the final word in the matter of selection of Principal/Headmaster in minority institutions

19. The next question that arises for consideration is whether institutions established by minority religious congregations, Trusts or such other Organizations or individuals can, as a matter of course or right, claim minority status without a formal declaration by a competent authority to that effect. The contention of the petitioners is that such a formal declaration is not at all necessary since the very fact that these institutions are established by a religious minority community will ipso facto make them eligible to get minority status. Is the above contention tenable?

20. Sri.Raveendranath, learned Senior Government Pleader, contends that no private aided educational institution, even assuming it is established by a minority community, can claim "minority status" as a matter or right, in the absence of a formal order issued by a competent authority recognising or declaring such status. Only those institutions which have satisfactorily established their eligibility to get the above status can seek the protection of Article 30(1) of the Constitution. He further contends that no individual or Organization/Congregation belonging to a religious minority community can claim minority status for the institution established by him unless and until the competent authority has formally declared it to be a minority institution. The competent authority is entitled to consider the question whether or not minority

status has to be conferred on an institution when such a request is received in that regard.

21. In this connection my attention has been invited to a decision rendered by a Division Bench of this Court in Evan's U.P. School v. State of Kerala (2001(1) KLT 849). This Court held that when a dispute or claim is raised with regard to the minority status of an institution, a declaration to that effect is inevitable so as to adjudicate the right of the parties. Learned Senior Government Pleader submits that the Government has not so far accorded minority status to the institutions run by the petitioners. Therefore petitioners cannot on their own, "confer" minority status to their institutions and claim immunity from the application of the statutory provisions under section 59 of the Act and the relevant statutes.

22. In Younus Kunju v. State of Kerala (2002(1) KLT SN 91) (case No.115) a Division Bench of this Court had yet again held that the claimant has to establish that the institution is administered by a minority community or individual as the case may be. If a dispute about the "status" arises, the issue has to be decided by the competent authority.

23. In N.Ammad v. Manager, Emjay High School (1998 (6) SCC 674) their Lordships of the Supreme Court have held thus:

> "...a school which is otherwise a minority school would continue to be so whether the Government declared it as such or not. Declaration by the Government is at

best only a recognition of an existing fact. Article 30(1) of the Constitution reads thus:

> "30(1). All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

When the Government declared the school as a minority school it has recognised a factual position that the School was established and is being administered by a minority community. The declaration is only an open acceptance of a legal character which should necessarily have existed antecedent to such declaration...."

In the above case the admitted position was that the school was declared by the Government as a minority school on August 2, 1994. The question that arose for consideration was whether the school could have claimed any protection as a minority school prior to the date of such declaration by the Government.

24. The above decision does not support the contention

raised by the petitioners that a formal declaration or order by the Government is not necessary or warranted, in the case of an institution established by a religious minority community. What has been held by the Supreme court is that the declaration of minority status by the Government would only be "an open acceptance of a legal character which should necessarily have existed antecedent to such declaration". Thus the apex Court has not laid down that a declaration or order is not contemplated.

25. It is true that the petitioners have asserted that their institutions have been established by a religious minority community. But no documents have been produced before this court to substantiate, atleast prima facie, that these institutions are entitled to get the protection of Article 30(1) of the Constitution, they being minority institutions. The status of "religious minority" which is a privilege sanctioned by the Constitution can be conferred on an institution only on satisfaction of requisite parameters and in terms of the procedure prescribed under the National Commission for Minority Educational Institutions Act, 2004 or other relevant orders of the Government. Even assuming a legal character of minority status is ingrained in an institution established or administered by such a community, that legal character should find a formal expression through an order to be passed by a competent authority. In my view, a mere assertion by a minority community or institution may not be sufficient to get "minority status". There must be a formal order or declaration by a competent authority to

that effect. Therefore the petitioners cannot be heard to say that they are entitled to get the protection of Article 30(1) of the Constitution even without formal order/declaration issued by a competent authority.

26. Therefore the questions posed in the judgment are answered as follows:

(a) Only the management of a religious minority institution can appoint a candidate of its choice as Principal of a private aided college. In the absence of a formal declaration of minority status, the management is bound to comply with the mandate contained in Section 59(3) of the M.G.University Act.

(b) The management of a private aided college is entitled to appoint a senior teacher as Drawing and Disbursing Officer in the temporary absence of approved Principal. The Government or the Directorate of Collegiate Education cannot insist that only the seniormost teacher can be appointed as the Drawing and Disbursing Officer in the temporary absence of an approved Principal. To the above extent, Ext.P6 order is quashed. But such a Drawing and Disbursing Officer cannot discharge the duties and functions of Principal.

Writ Petitions are disposed of as above. No costs.

A.K. Basheer,
Judge.

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